for his relief." The failure to add the sub-section recommended by him rendered possible, and perhaps inevitable, the conclusion reached in these 1907 decisions.

I say "*perhaps* inevitable," for a possible way out has been indicated by Mr. Thomas A. Street in a brief note on these same cases in the eleventh volume of Law Notes, page 105. He criticises the decisions in unmistakeable terms, and points out that the introduction of Clause 4 in Section 119—"by any other Act which will discharge a simple contract for the payment of money,"—contemplated the arising of situations unprovided for by a definite section of the Statute, and rendered possible their decision upon common law principles. This, he says, is such a situation. This clause was apparently not dwelt upon in either argument; perhaps it may yet have its effect upon the Courts. The only other Court which has passed upon the question, so far as the writer can discover, is the Supreme Court of New York, in the case of *National Citizens' Bank* v. *Toplitz,* 81 N. Y. Supp. 422 (1903), in which the same interpretation was rendered. The case has not the authority of the Court of Appeals, however, which refused to rule upon this very question, giving judgment upon another point in the pleading.

Mr. Street ends his article with a short but cogent invective against what he calls smooth but dangerous defining clauses (of the nature of Section 192), in all uniform codes, which clog the free play of judicial interpretation. Certainly if such a clause permits a construction contrary to the design of the draughtsmen[9] and subversive of a fundamental and generally accepted rule of the common law, the moral is not without its point.

Restrictions Upon the Use of Land.

A covenant running with the land at law must be under seal; privity of estate is required; and it is immaterial whether the subsequent transferees have notice or not. Those agreements, which run with the land only in equity, termed restrictions, require neither seal nor privity, and notice is essential. In actions upon covenants (1) between the original parties, and (2) by or against transferees; and in actions upon restrictions (3) between the original parties—but not (4) by or against

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[9] See address of A. M. Eaton—Reports of American Bar Association for 1907—page 1164.

transferees—there is a concurrent remedy at law and in equity. In all these three cases of concurrent jurisdiction, the question is always one of contracts; and the remedy in equity is always a question of the specific performance of contracts. Whether the burden is negative or affirmative[1] equity will grant relief, either against the original party or his transferee,[1] if the contract is such as equity can specifically enforce. In the fourth class of actions above—actions upon restrictions by or against transferees—there is no concurrent jurisdiction. The remedy in equity is exclusive. Nor is it based upon contract. It is not a question of specific performance, but of constructive trusts. Unless a holder is a purchaser for value and without notice,[2] he is bound as is a purchaser of land from one who has previously contracted to sell it. He takes a *res* in which another has an equity, and the obligation is constructively fastened upon him. In order that there be such an equity in the land, the agreement (1) must concern the use of the land; (2) it must be intended to bind future owners;[3] and (3) it must be one which equity has power specifically to enforce. In England the doctrine has been limited to negative burdens,[4] although as against the promisor, it is held to be immaterial whether the burden is affirmative[5] or negative. Since in England it is apparently the law, that the burden of a covenant running with the land, made by the owner of a fee simple with one other than his lessee, will not run so as to be enforceable against a transferee of the land,[6] there is never any remedy in England upon any agreement concerning land against a transferee, unless there can be a remedy by injunction—with the exception of the burden of a spurious easement, and of a charge upon land.[7] Both of the latter are held to run, and both impose affirmative duties. But in America the prevailing rule is that the burden of a covenant runs as well as the benefit,[8] and equity will

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[1] *Countryman* v. *Deck*, 13 Abb. New Cas. 110 (1883).

[2] *Tulk* v. *Moxhay*, 2 Ph. 774 (1848).

[3] Cf. *Norcross* v. *James*, 140 Mass. 188 (1885); *Brown* v. *Marshall*, 19 N. J. Eq. 537 (1868).

[4] *Haywood* v. *Brunswick Bldg. Soc.*, L. R. 8 Q. B. D. 403 (1881); Cf. *Hood* v. *North Eastern R. R.*, L. R., 8 Eq., Cas. 666 (1869).

[5] *Storer* v. *Great Western Ry. Co.*, 2 Y. & C. C. 48 (1842).

[6] *Keppel* v. *Bailey*, 2 Myln. & K. 517 (1834); *Austerberry* v. *Corp. of Oldham*, 29 Chan. Div. 750 (1885).

[7] *Morland* v. *Cook*, L. R. 6 Eq. 252 (1868) as explained in *Austerberry* v. *Corp. of Oldham*, *supra*.

[8] *Electric City Land & Improvement Co.* v. *West Ridge Coal Co.*, 187 Pa. 500 (1898).

enforce an affirmative burden against the transferee.[1] If the doctrine of constructive trusts is the true basis of allowing the burden of a restriction to run, it should also be immaterial whether it is affirmative or negative. If the contract is one that equity has power specifically to enforce, there is an equity in land in one case just as much as in the other. There is the same probability in one as in the other that the transferee paid less because of the burden—an unjust enrichment in each case. Unless there is some rule of policy, preventing the burdening of successive holders with the performance of affirmative acts for the benefit of others, those American courts which refuse to follow the English limitations, must be considered to have adopted the sounder rule.[9]

As to who is entitled to the benefit of the restriction, depends upon the intentions of the parties. Where the intentions are not expressed, it is a question of construction. Policy favors encumbering the land as little as possible; and therefore, unless a contrary intention appears, the benefit will be construed as personal to the promisee.[10] Prior grantees of the promisee may enforce the restriction against subsequent grantees, if it is clearly shown that it was so intended. This generally happens when land is divided up into lots, and laid out according to a general plan, and each lot is sold subject to the restrictions in that plan.[11] But if it appears that the restrictions were only intended for the benefit of the promisee, or land still retained by him, even though there were agreements between the promisee and each grantee, prior grantees will not be allowed the benefit of restrictions in subsequent grants.[12] If the intention is clearly expressed, there should be no reason why a restriction should not ensue to the benefit of an occupant of land never owned by the promisee. When the restriction benefits adjoining land, owned by the promisee, there is a presumption that it was for the benefit of this land, and subsequent holders can enforce it.[13] The assignment of the contract of restriction is presumed, when the land, to which it is attached, is assigned;

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[9] *Gould* v. *Partridge*, 52 N. Y. App. Div. 40 (1900).

[10] *Badger* v. *Broadman*, 16 Gray (Mass.) 559; *Keates* v. *Lyon*, L. R. 4 Chan. App. 218 (1869).

[11] *Barrow* v. *Richard*, 8 Paige (N. Y.) 351 (1840).

[12] *Jewell* v. *Lee*, 14 Allen (Mass.) 145 (1867); *Sharp* v. *Ropes*, 110 Mass. 381 (1892).

[13] *Peck* v. *Conway*, 119 Mass. 546 (1875); *Wilson* v. *Mass. Inst. Technology*, 75 N. E. Rep. (Mass.) 128 (1900). Cf. *Keates* v. *Lyon*, *supra*.

and the grantee gets the benefit of it whether he had notice of it or not.[14]

In a recent case land was conveyed to a canal company on condition that it construct a basin upon the land conveyed. The consideration was "the benefit which would result" to the grantors, "as owners of said land, by cutting the canal through, and erecting the said work, etc." The grantors erected a mill on the part retained, and for seventy years the basin was used by the grantors and their transferees as a place for loading and unloading vessels. A railroad acquired the land with notice, and constructed its road through the basin. The Court said that relief would have been granted upon the doctrine of Tulk *v.* Moxhay, were the original grantors bringing the bill; but denied relief to the subsequent grantees, because there was no reservation of an easement in fee, due to lack of words of inheritance, and because there was no covenant running with the land. Dawson *v.* Western Maryland Ry. Co., 68 Atl. Rep. (Md.) 301, Dec., 1907.[15] Whether the benefit was intended to be personal to the promisee, was not discussed. There may have been laches or acquiescence.[16] If the subsequent grantee was not entitled to the use of the basin, the purpose of the restriction could be considered to have failed, and therefore the burden should not be enforced.[17] In Massachusetts, where the same doctrine as to reservations is held, an opposite decision was reached, upon analogous facts.[18]

"Revival" of a "Revoked" Will.

One of the most mooted questions of the law of wills is the question of the so-called "revival" of a will "revoked" by an express statement to that effect in a later will, the revoking instrument being subsequently destroyed. The courts in England early differed as to the effect of such an act, the ecclesiastical courts holding that the question was one entirely of intention to be decided according to all the facts and circumstances of each particular case and to determine this question admitted

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[14] *Child* v. *Douglass,* Kay 560 (1854) and see *Rogers* v. *Hosegood* (1900) 2 Ch. 388, p. 406.

[15] Cf. *Hood* v. *North Eastern R. R.,* supra.

[16] *Whitney* v. *Union Ry.,* 11 Gray (Mass.) 359 (1858).

[17] *Duke of Bedford* v. *British Museum,* 2 M. & R. 552 (1822).

[18] *Bailey* v. *Agawan Nat. Bank,* 76 N. E. Rep. (Mass.) 449 (1901).